

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

FELIPE POLANCO DIAZ,
Plaintiff,
v.
BURTON, et al.,
Defendants.

No. 2:21-cv-1583 KJN P

ORDER

Plaintiff is a pro se state prisoner who seeks relief pursuant to 42 U.S.C. § 1983. On March 7, 2022, plaintiff filed a motion for emergency preliminary injunction and restraining order. (ECF No. 13.) Due to the pleading deficiencies identified below, plaintiff's motion is denied without prejudice.

I. Plaintiff's Amended Complaint

This action proceeds on plaintiff's amended complaint against defendants P. Ferris and E. Petersen at California Health Care Facility ("CHCF"); plaintiff alleges defendants violated his First Amendment right to freedom of religion by refusing to provide plaintiff with a kosher diet at CHCF.

II. Governing Law

A temporary restraining order preserves the status quo before a preliminary injunction hearing may be held; its provisional remedial nature is designed only to prevent irreparable loss

1 of rights prior to judgment. Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto
 2 Truck Drivers, 415 U.S. 423, 439 (1974). The standards for both forms of relief are essentially
 3 the same. See Stuhlbarg Int’l Sales Co. v. John D. Brush & Co., 240 F.3d 832, 839 n.7 (9th Cir.
 4 2001)(“Because our analysis is substantially identical for the injunction and the TRO [temporary
 5 restraining order], we do not address the TRO separately.”).

6 “A preliminary injunction is an extraordinary remedy never awarded as of right.” Winter
 7 v. Natural Resources Defense Council, Inc., 555 U.S. 7, 24 (2008) (citations omitted); Epona v.
 8 Cty. of Ventura, 876 F.3d 1214, 1227 (9th Cir. 2017). The party seeking a preliminary injunction
 9 must establish that “he is likely to succeed on the merits, that he is likely to suffer irreparable
 10 harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an
 11 injunction is in the public interest.” Winter, 555 U.S. at 20 (citations omitted); see also American
 12 Trucking Ass’ns, Inc. v. City of Los Angeles, 559 F.3d 1046, 1052 (9th Cir. 2009) (quoting
 13 Winter, 555 U.S. at 20); Fed. R. Civ. P. 65 (governing both temporary restraining orders and
 14 preliminary injunctions). An injunction may only be awarded upon a clear showing that the
 15 plaintiff is entitled to relief. See Winter, 555 U.S. at 22 (citation omitted). Also, an injunction
 16 against individuals not parties to an action is strongly disfavored. See Zenith Radio Corp. v.
 17 Hazeltine Research, Inc., 395 U.S. 100, 110 (1969) (“It is elementary that one is not bound by a
 18 judgment . . . resulting from litigation in which he is not designated as a party. . . .”).

19 Further, a plaintiff seeking preliminary injunctive relief must demonstrate a sufficient
 20 nexus between the injury claimed in the motion and the conduct asserted in the underlying
 21 complaint. Pacific Radiation Oncology, LLC v. Queen’s Medical Ctr., 810 F.3d 631, 636 (9th
 22 Cir. 2015). “The relationship . . . is sufficiently strong where the preliminary injunction would
 23 grant relief of the same character as that which may be granted finally.” Id. (quotation marks
 24 omitted). “Absent that relationship or nexus, the district court lacks authority to grant the relief
 25 requested.” Id.; see Saddiq v. Ryan, 703 F. App’x 570, 572 (9th Cir. 2017) (unpublished)
 26 (affirming denial of preliminary injunction because the prisoner did not establish a nexus between
 27 the claims of retaliation in his motion and the claims set forth in his complaint).

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1 III. Plaintiff's Motion

2 Since plaintiff filed the instant action, he was transferred back to California State Prison,
3 Sacramento ("CSP-SAC"). Plaintiff now seeks a preliminary emergency injunction ordering
4 defendants to "cease their deliberate violations and threats" (ECF No. 13 at 2), including denying
5 plaintiff law library access, ability to photocopy, retaliation, and threatening the safety of plaintiff
6 and his personal property (ECF No. 13-1 at 1). Inmate Gray witnessed Correctional Officer
7 Courter tell plaintiff: "[i]f you don't want to be here gas me and I'll beat your ass and take you to
8 ad-seg." (ECF No. 13-1 at 23.) Plaintiff claims he was transferred to moot his underlying claims,
9 and despite his objections that he faces safety concerns at CSP-SAC. (ECF No. 13-1 at 5-7.)
10 Plaintiff also alleges he was falsely charged with indecent exposure with masturbation on
11 February 5, 2022, and that the rules violation report was later switched and Correctional Officer
12 Leon included previously unreported details, arguably at the behest of Courter. Plaintiff also
13 includes allegations that he was denied law library access and supplies needed to comply with
14 court-ordered deadlines in this action.

15 In addition, plaintiff seeks a declaration that the acts and omissions described violate his
16 constitutional rights, and seeks payment of \$25,000 under Rule 37(a) "as a low expense for
17 obtaining this order." (ECF No. 13 at 3.) Plaintiff claims he will continue to be irreparably
18 injured by the conduct of the defendants unless this court grants this emergency preliminary
19 injunction and allows him a fair chance to exhaust administrative remedies. (ECF No. 13 at 2),
20 citing Jackson v. District of Columbia, 254 F.3d 262 (D.C. Cir. 2001).

21 IV. Discussion

22 First, a federal district court may issue emergency injunctive relief only if it has personal
23 jurisdiction over the parties and subject matter jurisdiction over the lawsuit. See Murphy Bros.,
24 Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 350 (1999) (noting that one "becomes a party
25 officially, and is required to take action in that capacity, only upon service of summons or other
26 authority-asserting measure stating the time within which the party served must appear to
27 defend."). The court may not attempt to determine the rights of persons not before it. See, e.g.,
28 Zepeda v. INS, 753 F.2d 719, 727-28 (9th Cir. 1983). Pursuant to Federal Rule of Civil

1 Procedure 65(d)(2), an injunction binds only “the parties to the action,” their “officers, agents,
 2 servants, employees, and attorneys,” and “other persons who are in active concert or
 3 participation.” Fed. R. Civ. P. 65(d)(2)(A)-(C).

4 The instant action proceeds solely on plaintiff’s claims that defendants Ferris and Petersen
 5 denied plaintiff a kosher diet at CHCF. In the caption of the instant motion, plaintiff lists Warden
 6 J. Lynch, Librarian A. Hubbard, Correctional Officers Courter and M. Leon, and “Ad-Seg
 7 staff/PSU Staff” as defendants, all employed at CSP-SAC. None of those individuals are named
 8 as defendants in this action. Therefore, this court has no personal jurisdiction over such
 9 individuals.

10 Second, there is no relationship between the denial of a kosher diet by defendants Ferris
 11 and Petersen and the varied claims and injuries raised in the instant motion.¹ “[T]here must be a
 12 relationship between the injury claimed in the motion for injunctive relief and the conduct
 13 asserted in the underlying claim.” Pacific Radiation Oncology, LLC v. Queen’s Medical Center,
 14 810 F.3d 631, 636 (9th Cir. 2015). In addition, the relief sought differs. In this action, plaintiff
 15 seeks a kosher diet and money damages; in his motion, plaintiff seeks, *inter alia*, an order
 16 separating him from Correctional Officers Courter and Leon, as well as precluding his housing at
 17 CSP-SAC. (ECF No. 13-1 at 15.) Because there is no relationship between plaintiff’s underlying
 18 allegations and the instant motion, the motion must be denied.

20 ¹ In any event, allegations of harassment, embarrassment, and defamation are not cognizable
 21 under section 1983. Rutledge v. Arizona Bd. of Regents, 660 F.2d 1345, 1353 (9th Cir. 1981),
 22 aff’d sub nom. Kush v. Rutledge, 460 U.S. 719 (1983); see also Franklin v. Oregon, 662 F.2d
 23 1337, 1344 (9th Cir. 1982) (allegations of harassment with regards to medical problems not
 24 cognizable); Ellingburg v. Lucas, 518 F.2d 1196, 1197 (8th Cir. 1975) (Arkansas state prisoner
 25 does not have cause of action under § 1983 for being called obscene name by prison employee);
 26 Batton v. North Carolina, 501 F.Supp. 1173, 1180 (E.D. N.C. 1980) (mere verbal abuse by prison
 27 officials does not state claim under § 1983). Nor are allegations of mere threats cognizable. See
 28 Gaut v. Sunn, 810 F.2d 923, 925 (9th Cir. 1987) (mere threat does not constitute constitutional
 wrong, nor do allegations that naked threat was for purpose of denying access to courts compel
 contrary result). Similarly, inmates do not have a right to be housed in any particular prison. See
Meachum v. Fano, 427 U.S. 215, 224-25 (1976) (conviction sufficiently extinguishes prisoner’s
 liberty interest and empowers the state to confine him in any of its prisons; no liberty interest
 protect by the Due Process Clause is implicated in a prison’s reclassification and transfer
 decisions).

1 Third, to the extent plaintiff seeks a temporary restraining order without notice upon an
 2 adverse party, he cannot prevail because his submission fails to set out “specific facts in an
 3 affidavit or a verified complaint . . . [which] clearly show that immediate and irreparable injury,
 4 loss, or damage will result . . . before the adverse party can be heard in opposition.” Fed. R. Civ.
 5 P. 65(b)(1)(A); Rizzo v. Goode, 423 U.S. 362, 378 (1976) (“it has long been held that an
 6 injunction is ‘to be used sparingly, and only in a clear and plain case.’”). While plaintiff’s motion
 7 is verified, plaintiff fails to demonstrate he is at risk of immediate and irreparable injury. Plaintiff
 8 claims he expressed safety concerns about being housed at CSP-SAC, but he failed to explain the
 9 nature of such concerns. In addition, in order to obtain injunctive relief, plaintiff is required to
 10 address each element under Winter. Plaintiff provides no facts demonstrating he is likely to
 11 succeed on the merits of this action, that the balance of equities tips in his favor, or that an
 12 injunction is in the public interest. Although he states that he will be irreparably injured by the
 13 defendants’ conduct, plaintiff fails to provide specific facts demonstrating he is at risk of
 14 imminent harm. Because plaintiff fails to address all of the elements under Winter, his motion is
 15 denied without prejudice.

16 Fourth, as to plaintiff’s access to the courts claim,² the record demonstrates that plaintiff
 17 was able to file an amended complaint with exhibits. (ECF No. 12.) Indeed, on March 8, 2022,
 18 the undersigned screened the pleading and ordered service on defendants Ferris and Petersen. In
 19 addition, plaintiff was able to file the instant motion. Plaintiff fails to demonstrate an actual
 20 injury as required under Lewis, 518 U.S. at 349.

21
 22 ² Prisoners have a constitutional right of access to the courts. Lewis v. Casey, 518 U.S. 343, 346
 23 (1996); Bounds v. Smith, 430 U.S. 817, 821 (1977), limited in part on other grounds by Lewis,
 24 518 U.S. at 354. The right of access to the courts is limited to non-frivolous direct criminal
 25 appeals, habeas corpus proceedings, and § 1983 actions. See Lewis, 518 U.S. at 353 n.3, 354-55.
 26 In order to frame a claim of a denial of the right to access the courts, a prisoner must establish that
 27 he has suffered “actual injury,” a jurisdictional requirement derived from the standing doctrine.
 28 Lewis, 518 U.S. at 349. An “actual injury” is “actual prejudice with respect to contemplated or
 existing litigation, such as the inability to meet a filing deadline or to present a claim.” Lewis,
 518 U.S. at 348 (citation and internal quotations omitted); see also Alvarez v. Hill, 518 F.3d
 1152, 1155 n.1 (9th Cir. 2008) (noting that “[f]ailure to show that a ‘non-frivolous legal claim had
 been frustrated’ is fatal” to a claim for denial of access to legal materials) (citing Lewis, 518 U.S.
 at 353 & n.4).

1 Fifth, plaintiff's request for payment of \$25,000.00 is not supported by Rule 37(a) of the
 2 Federal Rules of Civil Procedure, which governs the failure of parties to cooperate in discovery.
 3 Id. Moreover, plaintiff fails to demonstrate he has incurred such expenses in bringing this
 4 motion.

5 Sixth, to the extent plaintiff is attempting to obtain a court order relieving him of his
 6 obligation to exhaust administrative remedies prior to filing a federal court action, such relief is
 7 unavailable. Exhaustion of available administrative remedies is mandatory, and the Supreme
 8 Court stated that such "mandatory language means a court may not excuse a failure to exhaust."
 9 Ross v. Blake, 578 U.S. 632, 639-40 (2016).³ Because proper exhaustion is necessary, a prisoner
 10 cannot satisfy the exhaustion requirement by filing an untimely or otherwise procedurally
 11 defective administrative grievance or appeal. See Woodford, 548 U.S. at 90-93. "[T]o properly
 12 exhaust administrative remedies prisoners 'must complete the administrative review process in
 13 accordance with the applicable procedural rules,' [] - rules that are defined not by the PLRA, but
 14 by the prison grievance process itself." Jones v. Bock, 549 U.S. 199, 218 (2007) (quoting
 15 Woodford, 548 U.S. at 88). See also Marella v. Terhune, 568 F.3d 1024, 1027 (9th Cir. 2009)
 16 ("The California prison system's requirements 'define the boundaries of proper exhaustion.'")
 17 (quoting Jones, 549 U.S. at 218).

18 All of the incidents alleged in the motion took place in February of 2022, and aside from
 19 the initial transfer from CHCF, took place at CSP-SAC. The undersigned observes that plaintiff's
 20 motion is more akin to a new civil rights complaint against new defendants at CSP-SAC rather
 21 than a motion for injunctive relief against individuals named as defendants in this action. But

22
 23 ³ The Prison Litigation Reform Act ("PLRA") provides that "[n]o action shall be brought with
 24 respect to prison conditions under section 1983 . . . , or any other Federal law, by a prisoner
 25 confined in any jail, prison, or other correctional facility until such administrative remedies as are
 26 available are exhausted." 42 U.S.C. § 1997e(a). "[T]he PLRA's exhaustion requirement applies
 27 to all inmate suits about prison life, whether they involve general circumstances or particular
 28 episodes, and whether they allege excessive force or some other wrong." Porter v. Nussle, 534
 U.S. 516, 532 (2002). Proper exhaustion of available remedies is mandatory, Booth v. Churner,
 532 U.S. 731, 741 (2001), and "[p]roper exhaustion demands compliance with an agency's
 deadlines and other critical procedural rules[.]" Woodford v. Ngo, 548 U.S. 81, 90 (2006). The
 Supreme Court has also cautioned against reading futility or other exceptions into the statutory
 exhaustion requirement. See Booth, 532 U.S. at 741 n.6; Ross v. Blake, 578 U.S. at 639-40.

1 under California prison regulations,⁴ plaintiff must file separate grievances concerning his
2 challenge to his transfer, the rules violation report, and his allegations that certain prison staff
3 failed to protect plaintiff from harm, and any other distinct incident, in order to exhaust his
4 administrative remedies. Plaintiff's motion makes clear that plaintiff has not exhausted such
5 remedies. Thus, the undersigned declines to construe plaintiff's filing as a new complaint.
6 However, the Clerk is directed to return the original filing to plaintiff because he was unable to
7 photocopy one for his records, and because he may need the document or its exhibits to file a new
8 civil rights complaint once he has exhausted his administrative remedies. The court retains the
9 electronic copy of such filings.


10 For all of the above reasons, plaintiff's motion is denied without prejudice.

11 V. Conclusion

12 Accordingly, IT IS HEREBY ORDERED that:

- 13 1. Plaintiff's motion (ECF No. 13) is denied without prejudice; and
14 2. The Clerk of the Court is directed to return the original of plaintiff's motion and
15 exhibits (ECF No. 13 and 13-1) to plaintiff.

16 Dated: March 10, 2022

17 
18 KENDALL J. NEWMAN
19 UNITED STATES MAGISTRATE JUDGE

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25 ⁴ Since June 1, 2020, the California prison grievance system has two levels of review. Cal. Code
26 Regs. tit. 15, §§ 3483, 3486. "Completion of the review process by the Office of Appeals
27 resulting in a decision of 'denied,' 'granted,' 'no jurisdiction,' 'identified as staff misconduct,'
28 'pending legal matter,' or 'time expired' in accordance with subsections (g)(1) through (g)(3) and
(g)(8) through (g)(10) of this section constitutes exhaustion of all administrative remedies
available to a claimant within the department." Cal. Code Regs. tit. 15, § 3485(l).